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GERMAN LAWS RELATING TO PAYMENTS TO ALIEN ENEMIES.

Prior to the outbreak of the present war, the German law contained no provisions prohibiting trade with the enemy, except in so far as such trade might come within the definition of treason.[1] Since September 1914, a number of laws have been enacted in Germany which tend to assimilate the German law to the law prevailing in the United States and the principal Allied countries, but even under the present state of the German law, there is no general prohibition against trading with the enemy, and contracts not involving the transmission of moneys or securities during the war are valid. Furthermore, alien enemies are not under special disabilities as parties to judicial proceedings. The law accords them a *locus standi in judicio* both as plaintiffs and defendants in the ordinary courts as well as in the prize courts, and this regardless of their place of domicile or residence. Few practical questions arise as to the running of statutes of limitation against an enemy claimant, as it has been provided that the period from January 1, 1914, to December 31, 1916, is not to be deemed a part of the statutory period as regards claims of the nature mentioned in Articles 196 and 197 of the Civil Code, or Articles 901, 902 and 904 (2) of the Code of Commerce.[2]

Beginning with an ordinance of September 4, 1914, relating to the supervision of foreign business undertakings, the German government has promulgated a long series of laws dealing with the prohibition of payments to certain enemy countries, the seizure of enemy goods in the German customs, the sequestration of enemy

[1]Such was the case of Güterbock, the Frankfort banker, who, during the Franco-Prussian War, purchased French state securities.

[2]Notification Dec. 22, 1914, RGB. (Reichsgesetzblatt) 543; notification Nov. 4, 1915, RGB. 732. The suspension of the statutes of limitation does not apply to actions in tort. *Cf.*, article by v. Dassel in Recht (1915) 629.

property, the importation and transit of goods that are products of the soil or industries of enemy states, the winding-up of enemy business undertakings, and the annulment of contracts where one of the parties is an alien enemy.[3]

In the present article, it is proposed to deal only with the enactments relating to the prohibition of payments to enemy countries. The principal ordinance relating hereto is that of September 30, 1914,[4] which was originally directed against Great Britain but was subsequently extended to certain other Allied countries, and has now been extended to the United States of America by a notification of August 9, 1917.[5]

The ordinance of September 30, 1914,[6] hereinafter referred to as the "principal ordinance", prohibits payments to persons domiciled or resident in Great Britain or Ireland, or in the British colonies or foreign possessions, whether such payments be in cash, bills of exchange, checks or by assignment or otherwise, and prohibits the transmission, directly or indirectly, of funds or securities to such persons. Pecuniary obligations, whether due at the time of the going into force of the ordinance or thereafter becoming due to any person, natural or juristic, domiciled or resident in the territory mentioned, are regarded as suspended from July 31, 1914, or from any subsequent date upon which they mature. During the period of suspension no interest can be demanded, and any legal consequences resulting from non-performance of any act that may have resulted between July 31, 1914, and September 30, 1914, are not regarded as having taken place (Sect. 1).

The ordinance affects also the assignee of an obligation, unless the assignment was made prior to July 31, 1914, or, if the assignee has his domicile or residence within the German Empire, which was made before the ordinance went into effect (September 30, 1914). A person who has paid on behalf of another and is entitled to

[3]For a consideration of the principal provisions of these ordinances, see a series of articles by Richard King in collaboration with the present writer, in 59 Solicitors' Journal (London) 22, 39, 55, 70, 126, 378, 394, *et seq.* See also King, The German Enemy Contracts Annulment Ordinance, in 2 International Law Notes (London) 5; Speyer and Huberich, De Noodwetgeving van het Duitsche Rijk (The Hague, 1915).

[4]RGB. 421.

[5]Reichsanzeiger No. 191 of Aug. 13, 1917.

[6]This ordinance was decreed by the Bundesrat under the powers conferred by the law of August 4, 1914 (RGB. 327), to enact such ordinances as might be necessary to safeguard economic interests. The subsequent notifications extending the operation of the principal ordinance were issued by the imperial chancellor under the power conferred upon him by the principal ordinance.

reimbursement on this ground, is in the same position as an assignee (Sect. 2).

A debtor may free himself from his obligation by depositing at the Reichsbank the amount or the securities involved to the credit of the person entitled (Sect. 3).

When the time for presentment of payment or protest for non-payment of a bill of exchange had not expired on September 30, 1914, the time of presentment and protest is extended during the time the ordinance is in force, and thereafter according to any notifications that may be made by the imperial chancellor. These provisions also apply to checks. Additional stamp duties are not imposed (Sect. 4).

The ordinance does not apply to obligations performable within Germany, and in favor of local branches of British firms, provided that the claim arose out of a domestic transaction. This proviso does not apply to claims, made by a German branch against local debtors, for non-acceptance or non-payment of a bill of exchange payable in a foreign country (Sect. 5).

The penalty for violation of the ordinance is a fine not exceeding 50,000 marks, or imprisonment for three years, or both such fine and imprisonment. The attempt is punishable. The ordinance fixes a like penalty for the direct or indirect exportation from Germany or from any other country, of goods to British territory, where the exportation of such goods is prohibited under general laws of proclamations relating to exports (Sect. 6).

The imperial chancellor is empowered to grant licenses and to extend the operations of the ordinance to other countries at war with Germany (Sect. 7).

By a notification of October 20, 1914, of the imperial chancellor, the ordinance of September 30, 1914 was declared to be operative as to France and the French colonies and foreign possessions.[7] By similar notification of November 19, 1914,[8] the ordinance was extended to Russia and Finland. It does not apply to the portions of Russia in the military occupation of Germany or Austria.[9]

On October 14, 1915,[10] the principal ordinance was extended to the British territory of occupation in Egypt, and to the territory

[7] RGB. 443.

[8] RGB. 479.

[9] Notification Feb. 4, 1915, RGB. 69.

[10] RGB. 673.

of Morocco under French protectorate. The position of an assignee is determined not as in the principal ordinance, but solely by the circumstance whether he acquired title prior to the going into effect of the notification of October 14, 1915.

By notification of May 14, 1916,[11] the principal ordinance was extended to Portugal and the Portuguese colonies. The rights of an assignee are determined as of March 9, 1916. By notification of August 28, 1916,[12] the principal ordinance was made applicable to Roumania and the rights of assignees determined as of August 28, 1916.

By notification of November 24, 1916,[13] the principal ordinance was extended to Italy, the Italian colonies and foreign possessions and the territories in the occupation of Italian forces. Payments are prohibited in so far as they relate to commercial transactions within the meaning of the German Code of Commerce, or, if they relate to transactions which as to either or both of the parties are commercial transactions within the meaning of the Code of Commerce or relate to the payment of bills of exchange or checks or to the public debt of the empire or of a federal state. The rights of assignees are determined as of April 30, 1916.

Finally by a notification of August 9, 1917,[14] the principal ordinance was extended to the United States of America. The rights of assignees are determined as of April 6, 1917.

Doubts soon arose as to the interpretation of the principal ordinance. Section 2 prohibits generally all payments to Great Britain and the British possessions. Section 5, however, permitted payments to local branches of enemy firms in so far as the claim arose in connection with local (inland) business of the firm. The question arose as to what was to be deemed a transaction of the latter character. Suppose the German branch of a British bank presents to a German firm a bill of exchange for acceptance or payment and the bill is one drawn in a foreign country against the shipment. These bills had usually been discounted by a foreign (*e. g.*, Indian, South African) branch of the same institution and endorsed to the German branch, or there might exist a general agreement between a German firm and the foreign branch of an English bank originally entered into through the intermediary of the German branch of the English bank, to the effect that the foreign branch is

[11] RGB. 375.
[12] RGB. 971.
[13] RGB. 1289.
[14] Reichsanzeiger No. 191 of Aug. 13, 1917.

to discount bills drawn on the German firm. By an ordinance of December 22, 1914,[15] it is provided that the mere fact that the local branch in Germany of the British bank has extended the credit or acted as the intermediary in the making of the contract between the German firm and the foreign branch of the British bank, or is the endorsee of the bill, or presents the same for payment or acceptance, is not sufficient to bring the German branch within the exception provided for in Section 5 of the principal ordinance. Suppose, also, that an agreement exists between a German firm and the principal office in London of a British bank to the effect that payments are to be covered in London, but that under certain circumstances or as the result of custom, payments were to be or in fact usually were made to the German branch of the British bank, which local branch had in fact acted as the intermediary in the making of the contract between the German firm and the principal office in London. Here also, the exception provided for in Section 5 of the principal ordinance is not to apply, and the obligation is not to be regarded as one payable to a German branch of an enemy firm. In view of the large quantities of bills which were held by German branches of British banks, and which had been discounted by foreign branches of the same bank, the ordinance of December 22, 1914, is of far-reaching importance. Bills drawn in foreign countries on Germany have since the beginning of the war been subject to a moratorium. Under the ordinance of December 22, 1914, these bills are not alone extended as other foreign bills to the end of the war subject to the payment of interest, but interest ceases after maturity or after July 31, 1914, whichever is the later date.

By various notifications exceptions to the prohibition of payments have been introduced. Thus, by various notifications permission is granted for the remittance of sums required for the payment of fees for patents, trade marks, *etc.*, or the payment of rents and rent taxes[16] unless sufficient money or liquid assets were left in the enemy country to pay these charges. As a matter of practice, the German authorities have also uniformly granted licenses[17] for the transmission of funds for the payment of insurance premiums, interest on mortgages, taxes, deposits for court costs, attorneys'

[15]RGB. 542.

[16]Notification Oct. 20, 1915, Reichsanzeiger No. 248.

[17]These licenses are issued by the office of the imperial chancellor (Reichskanzleramt).

fees and other cases where the transmission of funds was necessary for the protection of German interests in the enemy country.

The principal ordinance in terms permits the remittance of funds required for the support of German subjects within the prohibited territory. By a notification of December 20, 1914,[18] payments can be made to German subjects who are the owners of or partners in a business undertaking having its principal place of business in an enemy country and where such German subject has left the enemy country by reason of war.

From the above statement as to the territories to which payments may not be made, it will be noted that considerable diversity is shown in the language employed.[19] The laws prohibit payments to the "colonies and foreign possessions" of Great Britain, France and Italy. Are the words, "foreign possessions" to be interpreted according to the national constitutional law of each of these countries? Do the words "foreign possessions" of Great Britain mean the British overseas dominions, exclusive of the territories that are under English constitutional law "colonies"? Clearly the Empire of India, the Dominions of Canada and New Zealand, and the Commonwealth of Australia are included; but *quaere* do the words "foreign possessions" include British protectorates such as Sarawak, North Borneo, Brunei and Zanzibar?[20] The same question arises as to the French protectorates, and as to German colonies in the military occupation of the Allies. Finally, the question arises as to whether the words "United States of America" as used in the notification of August 9, 1917, includes the insular possessions of the United States. This is of importance in connection with the question of the suspension of interest payments after maturity. If the words "foreign possessions" of Great Britain do not apply to the British protectorates, or the words "United States of America" do not include the American insular possessions, there is no prohibition of payment to persons domiciled or resident in these territories, and interest is payable after maturity.

The laws prohibit payments, *etc.*, to all persons, natural or juristic, within the territories designated. The nationality of the recipient is immaterial.[21] The laws adopt the territorial principle

[18]RGB. 550.

[19]These laws are not in force in the occupied territories of Belgium and Russia. The analogous enactments in force in the former territories are reprinted in Huberich and Speyer, German Legislation for the Occupied Territories of Belgium.

[20]Bendix, Bürgerliches Kriegssonderrecht, 124.

[21]Mayer, Privatrecht des Krieges, 104.

of the English and American law relating to trading with the enemy, as distinguished from the principle of the French and Italian enactments which are based on nationality. Hence, a payment to an American citizen resident in Germany, or in any other territory to which payments are not interdicted,—whether such territory is Allied (*e. g.*, Austrian), neutral (*e. g.*, Switzerland), or enemy (*e. g.*, Belgian Congo),—is permitted.[22]

The laws prohibit any direct or indirect payment to any persons domiciled or resident within the territories named. The purpose of the laws is to prevent all acts tending to increase the resources of the enemy state. It is, therefore, immaterial whether the payment be made out of funds within the German Empire or out of funds in another country. A person within Germany may, therefore, not order his debtor in a neutral country, to pay to a person, say, in the United States,[23] even though such German assets in the neutral country are subject to attachment or garnishment at the suit of the American creditor. The voluntary payment would place the enemy creditor, and through him the enemy state, in control of the funds more rapidly than if subject to the delays of a judicial proceeding.[24]

So, also, where the defendant was a partner of a firm carrying on business in Chile, and was informed by the resident Chilean partner that an English firm with which the Chilean firm was dealing had refused to fill orders unless certain amounts already due be paid, and thereupon instructed the Chilean partner by a cable sent from Germany through a neutral country, to remit to the English firm, the defendant was held guilty of violation of the law.[25] On the other hand, the payment of the purchase price of English and French goods to merchants in a neutral country with knowledge that the sums so paid would be used by such merchants to pay for these goods, was held to be no violation of the law, and more particularly was held not to be an indirect payment to the enemy country. The court said that it would be necessary to prove that the defendant had the intent to pay to persons in England and France through the intermediary of the neutral persons.[26]

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[22]Mayer, *loc. cit.*, 104.

[23]49 Imperial Supreme Court Decisions (criminal cases) 437.

[24]*Ibid.* This is similar to the views expressed by the English Court of Criminal Appeal in Rex *v.* Kupfer (1915) 31 T. L. R. 223.

[25]Deutsche Juristen Zeitung (1915) 699, 49 Imperial Supreme Court Decisions (criminal cases) 286. The decision is criticized by Liszt, in Juristische Wochenschrift (1916) 1282.

[26]Imperial Supreme Court (criminal cases) in Deutsche Juristen Zeitung (1916) 817.

It has already been noted that payments to local branches of enemy firms are not prohibited. The question arises as to whether payments can be made to a resident agent of the foreign enemy creditor. Upon this point, the authorities differ. It has been held that where payments are made to an agent who uses the funds so received in order to reimburse himself for his own claims against the enemy creditors, there is no violation of law.[27] But where the facts of the case are such as to arouse a suspicion that the moneys paid to the resident agent will be transmitted in violation of law, the payment cannot be made.[28] The better view as to the law governing payments to a resident agent is set forth in an opinion of the Arbitration Board of the Hamburg Chamber of Commerce.[29] It was here said that payments could be made to a duly authorized representative, and that the question whether this representative might remit to his principal is not for the person making the payment or the debtor to determine. The payment to an agent is not *per se* an indirect payment to the enemy creditor so long as there is no occasion to believe that the agent will transmit the funds to the enemy country.

The prevailing opinion is that where a payment is made in violation of law, it is void, and the person so paying it precluded from recovery under Article 817 of the Civil Code.

A person doing business in an enemy country may prove in bankruptcy. An English firm having an office in Hamburg presented a claim against a bankrupt debtor. The assignee refused to allow the claim on the ground that under the ordinance of September 30, 1914 payment could not be made. The court allowed the claim, stating that the mere fact that the debt was due to an English firm, was not a ground for a refusal to recognize it. The claim was merely suspended and was legally in the position of a conditional obligation for which provision must be made by the assignee.[30]

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[27]Recht (1916) 200 No. 433.

[28]32 Entscheidungen der Oberlandesgerichte 294. This is contrary to the views of the American courts, where it is laid down that a person paying to an agent cannot presume that the agent will violate the law by transmitting the funds received to an enemy country, Conn *v.* Penn (1818) Peters Circ. Ct. 496. Such payment is furthermore not a payment to a foreign country. Bendix, *loc. cit.*, 124.

[29]Hanseatische Gerichtszeitung 1915 (Hauptblatt) 72.

[30]Decision of January 28th, 1915 (Hamburg). The question, however, arises as to whether the filing of the claim is not precluded under the ordinance of August 7, 1914, directed against all claims by foreign creditors, regardless whether they are alien enemies or not, where the obligation

The law suspends existing obligations as of July 31, 1914, in the case of Great Britain, or, as of April 6, 1917, in the case of the United States, or as of any subsequent date upon which the obligation matures. The law is confined to pecuniary (*vermögensrechtliche*) obligations, that is to say, obligations which are or can be estimated in money,[31] and applies only to obligations, the performance of which is subject to German law.

During the period of suspension, if the obligation is an interest-bearing one, interest is payable up to July 31, 1914 (or such subsequent date as is mentioned in the several ordinances) or up to the maturity of the obligation, whichever is the later date. Interest is not payable after such date or after maturity, even though the contract expressly provides for interest after maturity. This latter point of the ordinance has been before the English court, and it was held[32] that it is confiscatory, and as such is within the principle

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was incurred prior to July 31, 1914. Deutsche Juristen Zeitung (1915) 885. Alien enemies are clearly entitled to prove in bankruptcy claims arising out of obligations entered into after July 31, 1914.

[31]Bendix, *loc. cit.*, 127.

[32]*In re* Fried Krupp Actiengesellschaft [1917] 2 Ch. 188. In this case Younger, *J.*, says:

> "No objection can of course be taken on principle to any German enactment which would prohibit during the war any payment of money by a German to any person resident or carrying on business in enemy country, but the cancellation of all liability for agreed interest during suspense of payment, and that for the benefit of one party to the contract alone, stands on quite a different footing. The German debtor has the use during the period of suspension of the money he is prohibited from paying, and it is difficult to find any just reason why he should in these circumstances after the war be relieved of his contractual liability to pay interest when he is not relieved of the liability to repay the principal. In truth, however, there is no justice in the matter; the relief is interested and partial, as is sufficiently shown by the fact that it is not made reciprocal. In that state of things it appears to me impossible that any Court in this country can recognize a German ordinance of this description, and there is, I think, a choice of grounds on which refusal to do so can properly be based. It may, I think, first of all be said that such an ordinance as this is no part of the general German law, by which the parties to this contract alone agreed to be bound. And even if such an ordinance must be treated as part of that law, it may, I think, properly be held that no such essentially one-sided development of the system could have been within the contemplation of either party to the contract at the time when they entered into it and agreed that their rights thereunder were to be regulated by German law. But, further, this ordinance, with its marked bias in favour of German nationals as against British subjects, can, in my opinion, create in this country no disability upon a person against whom its provisions are directed, and the language of Lord Ellenborough in Wolff *v.* Oxholm (6 M. & S. 92) may, with the necessary

of *Wolff* v. *Oxholm*.[33] It is, however, in accord with the American practice.[34] The question of the adjustment of claims arising out of acts of this character is an appropriate one for consideration in connection with the treaty of peace.

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modifications, justly be applied to it, so far as it operates to extinguish all German liability for conventional interest, as being one which is not comformable to the usage of nations, and which, therefore, Messrs. Wild could not expect, and which neither they nor we are bound to regard. Whatever ground of decision is chosen, it is, I think, clear that in this Court Messrs. Wild's debt carries interest unaffected by the ordinance, and that accordingly this summons must be dismissed." (At pp. 193, 194).

[33](1817) 6 M. & S. 92.

[34]Brown *v.* Hiatts (1872) 82 U. S. 177. Field, *J.*, at page 185, says:

"As the enforcement of contracts between enemies made before the war is suspended during the war, the running of interest thereon during such suspension ceases. Interest is the compensation allowed by law, or fixed by the parties, for the use or forbearance of money, or as damages for its detention, and it would be manifestly unjust to exact such compensation, or damages, when the payment of the principal debt was interdicted."

See cases in L.R.A. 1917 C 672, 673, notes 70, 71; *cf.*, Du Bellois *v.* Lord Waterpark (1822) 1 Dowl. & Ryl. 16.